

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK SHULER

Claimant

VS.

CARLSON COMPANY, INC.

Respondent

AND

LIBERTY MUTUAL INS. CO.

Insurance Carrier

Docket No. 204,258

ORDER

Respondent and its insurance carrier request review of the October 20, 2006 Review & Modification Award by Administrative Law Judge Thomas Klein. The Board heard oral argument on January 19, 2007.

APPEARANCES

Dennis L. Phelps of Wichita, Kansas, appeared for the claimant. Douglas D. Johnson of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The parties had resolved this claim by an agreed Stipulated Running Award filed December 6, 1995, which compensated claimant for a 10 percent whole person functional impairment. The claimant filed an application for review and modification of that award on January 20, 2005. The Administrative Law Judge (ALJ) found the claimant's disability had increased to a permanent total disability based upon Dr. Larry T. Bumguardner's testimony.

The respondent requests review of whether the claimant has sustained his burden of proof that his functional disability has increased due to his accidental injury on December 16, 1994; whether claimant suffered a work disability as a result of his underlying injury; and, whether the claimant's increased disability, if any, was caused by an intervening work-related injury or some other intervening cause(s).

Respondent argues the claimant has failed to sustained his burden of proof that there was an increase in his disability and therefore the ALJ's Award should be reversed with the Stipulated Running Award to remain in full force and effect. Respondent further argues the record establishes that claimant sustained an intervening injury to his low back on August 13, 1995.

Claimant argues he is essentially and realistically unemployable and the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was laid off from employment with Boeing in 1994 and went to work for respondent in July 1994. On December 16, 1994, claimant injured his low back while helping a co-worker lift a large brake or clutch assembly that weighed more than 100 pounds. On February 27, 1995, Dr. Eustaquio O. Abay performed surgery on claimant's back. The surgery was a left L4-5 partial hemilaminectomy, discectomy with foraminotomy of the left L5 nerve root.

On December 6, 1995, the claimant entered into a Stipulated Running Award wherein the claimant sustained a 10 percent functional impairment to the body as a whole with the right to future review and modification. On January 20, 2005, the claimant's application for review and modification was filed with the Division wherein the claimant was requesting an increase in his Award for permanent total disability since his condition has progressed and worsened.

The claimant testified that he was given restrictions and in August 1995 received a call back to return to work for Boeing. Claimant further testified that upon his return to work at Boeing his restrictions were accommodated and he was placed in a job at a stationary bench where he did not lift anything heavier than 10 or 15 pounds and parts were brought to him. Claimant testified that he performed this job from 1995 until he was laid off on November 8, 2002. Claimant testified that he would alternate sitting at this job because if he sat too long his legs would go numb. Finally, the claimant testified that his back symptoms worsened and he talked to Dr. Bumgardner about his condition on numerous occasions over the years.

Boeing medical records indicate claimant injured his back on August 13, 1995. Claimant did not recall that incident. The stipulated Boeing records indicate that claimant was to be referred to Dr. Abay for reevaluation and management. The claimant also was to be evaluated as an alternative work candidate. The contemporaneous medical records further indicate claimant was to limit his work to an 8-hour day for a few months. The claimant then suffered an injury to his ankle on September 8, 1995, which required that he wear a cam walker. By January 1996 claimant began to complain of bilateral knee pain which lead to restrictions limiting claimant to a sit down job and no stair climbing.¹ After the bilateral knee complaints in January 1996 claimant performed work that allowed him to alternate sitting and standing and as the condition of his knees worsened he was provided a scooter to use in the facility as well as handicapped parking. Boeing continued to provide claimant accommodated work until November 8, 2002, when claimant was terminated in an economic layoff.

It is significant to note that Boeing's records stipulated into evidence as well as the medical records from Dr. Jay S. Jones indicate that claimant was performing work that required him to climb machines, stairs and get up and down on machinery in January 1996.

Dr. Larry Bumguardner, board certified in family practice, provided claimant conservative treatment consisting of medication for his back complaints from the early 1990's through the present. Claimant complains of losing sensitivity in his legs. And he denied any back injury from 1995 to 2002 while working for Boeing. Claimant began receiving social security disability in November 2002.

Initially, respondent argues that when claimant returned to work at Boeing he then suffered the August 13, 1995 back injury which resulted in permanent work restrictions. Consequently, respondent argues claimant suffered an intervening back injury. Boeing's records do indicate that claimant suffered an injury described as an aggravation to his back. However, those records also detail an additional ankle injury as well as complaints regarding bilateral knee pain. And it was not until the claimant's knee complaints that it appears claimant received permanent restrictions limiting his standing, walking and climbing. Moreover, Boeing's records and Dr. Jones' history taken at claimant's initial office visit in January 1996 both indicate that in 1996 claimant's job still required climbing on machines and stairs. This is contrary to respondent's argument that claimant received permanent restrictions after suffering a new back injury on August 13, 1995. And Dr. Bumguardner noted that the later diagnostic studies did not indicate any specific change in claimant's overall condition as a result of the August 13, 1995 incident at Boeing.

Dr. Bumguardner's uncontroverted testimony established that claimant's worsening back condition is a natural and probable consequence of his initial injury with respondent in 1994. Dr. Bumguardner's opinion was that MRI studies in 2002 and 2005 revealed

¹ Stipulation filed June 28, 2006, at 11.

epidural fibrosis, which is scarring in the epidural space. And that scarring was due to the surgery in 1995. Finally, Dr. Bumguardner opined that claimant is realistically unemployable as a result of his back condition. Dr. Bumguardner testified:

Q. Sometimes people ask - - when they get asked the question about a person not being employable from a medical standpoint, the doctor gets asked the question, well, don't you think there's some kind of parking lot attendant job or something of that nature that he could do on an eight-hour basis, and, apparently, it's your view that he cannot do that kind of work given his current disability stemming from this back injury, explain to me why you feel that.

A. I cannot envision a job that Mr. Shuler could undertake on an eight-hour basis. His difficulty in ambulating and standing and sitting would preclude him from being able to participate in any type of gainful employment that I am aware of as a job opportunity. He requires periods of time where he is recumbent, to lie down during the day, and those times are increasing in length as well as frequency. And quite frankly, I can't see an employer that would have the ability to provide the flexibility necessary for him to be able to enter into any type of gainful employment.²

K.S.A. 44-510c(a)(2) (Furse 1993) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) (Furse 1993), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.³

In *Wardlow*⁴, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

² Bumguardner Depo. at 28-29.

³ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁴ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The uncontradicted medical evidence in this claim establishes that claimant's back condition has worsened as a natural and probable consequence of the December 16, 1994 accidental injury and as a result claimant is now essentially unemployable. Although claimant had significant knee problems while he worked at Boeing, Dr. Jones opined that claimant's knees would not prevent claimant from substantial gainful employment. Consequently, claimant has met his burden of proof to establish that as a direct consequence of his back injury suffered working for respondent, he is now permanently and totally disabled.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Thomas Klein dated October 20, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge